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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) No. CR-08 - 298 SI
vs.)
Plaintiff,) DEFENDANT'S REPLY TO
vs.) GOVERNMENT'S OPPOSITION TO
JAMES LINTZ,) MOTION TO SUPPRESS EVIDENCE
Defendant.)

The Government has filed an opposition to the defendant's motion to suppress evidence, and has indicated in that opposition that it does not believe that an evidentiary hearing is necessary to resolve this motion. The defendant disagrees, and believes that an evidentiary hearing is necessary for a number of reasons as is set forth below.

FACTS

22 In his original motion, the defendant indicated that there were no facts which justified the
23 stop of the vehicle in which Mr. Lintz had been a passenger on the afternoon of March 24, 2008.
24 In its opposition, the Government argues that the stop was justified by the fact that police officers
25 saw that a brake light was not functioning on the car at issue, and that as a consequence the stop
26 was a valid traffic stop. Gov. Opp'n. at 2. This claim is invalid for a number of reasons.

1 First, the declaration of Officer Kirchner, attached to the Government's opposition, is not
 2 a declaration from the individual with personal information about the facts at issue. Officer
 3 Kirchner states that "we were passed by a Jeep with a driver side brake light out." Kirchner
 4 Decl. at 2. He goes on to say that "one of the *other* officers (Officer Coleman) spotted the traffic
 5 violation and followed the vehicle northbound on Hudson towards Reuel court." *Id.* (emphasis
 6 added). It is therefore clear that it was Officer Coleman, and *not* Officer Kirchner, who
 7 supposedly saw the alleged traffic violation, and it is not sufficient for the Government to claim
 8 that there was a valid basis for the stop based upon the declaration of a person without personal
 9 knowledge of that violation. *See* N.D. Cal. Crim. L.R. 47-5 (incorporating Civ. L.R. 7-5, Fed.
 10 R. Civil P. 56(e)).

11 Second, the Government fully admits that the police report originally filed by Officer
 12 Kirchner refutes the assertion now made by him in his declaration that the police stopped the
 13 vehicle because of a burned out *brake* light. As Officer Kirchner admits, his police report states
 14 that the stop was based on the fact that the Jeep at issue had "a driver side tail light out."
 15 Kirchner Report at 6. Apparently realizing that such an assertion would be hard to support at a
 16 hearing insofar as the stop occurred at 4:00 in the afternoon when the Jeep's lights would not be
 17 on, Officer Kirchner now asserts that the statement in his report about the tail light was a
 18 "typographical error" and that he meant to say *brake* light.

19 Not only is the difference between a tail light and *brake* light a substantive and not
 20 typographical error, but Officer Kirchner's declaration is refuted by the video of the interrogation
 21 of Mr. Lintz after his arrest. During the course of this completely illegal interrogation,¹ one of
 22

23 ¹ The interrogation was illegal because Mr. Lintz never waived his right to remain silent
 24 before he was interrogated by the police officers who arrested him. The only reason why the
 25 defendant has not moved to suppress these statements is because he realizes that illegally
 26 obtained statements may be used at a suppression hearing, and further understands that should
 this Court find that Mr. Lintz's arrest and search were illegal his statements automatically will be
 suppressed. If for whatever reason this case were to go to trial to preserve a denial of this
 motion, Mr. Lintz respectfully asks for permission to brief this issue.

1 the officers² conducting the interrogation tells Mr. Lintz that he will be writing a report which
 2 “tells a story” about what happened, and then recites the facts leading up to the stop of the car;
 3 *i.e.* that they [the police] saw a “car load of guys”, “the *tail light* was *broken*,” and they then did a
 4 traffic stop. (Emphasis added). Apparently, the official version of the reason for the stop has
 5 three variations; a tail light was broken, a tail light was merely burned out, and now it is a brake
 6 light which was not functioning on the vehicle.

7 In addition to these contradictory claims, the discovery provided to the defendant shows
 8 that the driver of the vehicle, Charles Toney, was never cited for the alleged vehicle violation
 9 relied upon by Officer Kirchner to justify the stop. Specifically, there is a space on the police
 10 report reserved for noting any citations issued the vehicle driver. None is marked in Officer
 11 Kirchner’s report. *See* Kirchner Report at 2 (attached to defendant’s original motion). In
 12 addition, on page five of that report, there is a section in which the reporting officer is supposed
 13 to describe the vehicle at issue and report any damage or other “information” about the vehicle.
 14 Again, nowhere in this section is there any mention of a broken tail light, a burned out tail light,
 15 or a burned out brake light. Finally, an investigator from undersigned counsel’s office has
 16 contacted the Department of Motor Vehicles, and was told that Mr. Toney has no record of being
 17 given a ticket on March 24, 2008. *See* declaration of Robert Ultan (attached).³ Thus, there is no
 18 independent verification of the basis for the stop (*i.e.*, a ticket or even a notation in the police
 19 report) where such verification would be expected.

20 The fact that the Government has submitted a declaration of an individual without
 21 personal knowledge of the facts at issue merits the granting of the defendant’s motion to suppress
 22 on the ground that the initial stop of the vehicle was unfounded. At the least, the inconsistencies
 23

24 ² The video does not identify the officer who made the statement; the defendant presumes
 25 the officer is Officer Kirchner.

26 ³ Mr. Ultan has asked for a copy of the record to be sent to our office; it has not yet
 arrived.

1 in the record relating to the alleged basis for the stop merits an evidentiary hearing where the
2 officers involved in this stop will be subjected to cross examination about the claims which the
3 Government uses to justify the vehicle stop.

4 As for the facts relating to Mr. Lintz's actual detention, there are disputes about whether
5 the police car was behind the Jeep when Mr. Lintz got out of the car; Mr. Lintz claims that the
6 police car was not behind the Jeep when he got out and walked away, and the Government claims
7 it was. This fact is important, because there are issues here about whether Mr. Lintz got out of
8 the car after it had been pulled over, or whether he got out of a car which had stopped for reasons
9 independent of the police, and was simply walking down the street towards a friend's house
10 when he was ordered to return to the car. Again, an evidentiary hearing is required so that this
11 Court can determine exactly what happened here and the sequence of events.

12 There is one final factual matter which Mr. Lintz believes should be explored further.
13 Time and again in cases very similar to this, undersigned counsel has seen claims by police that
14 at the time of the defendant's arrest the police were looking for a person who generally fit the
15 description of the defendant for some serious crime based upon the tip of an "anonymous
16 informant." When called upon to provide further information about the alleged tip, the police
17 cannot provide any further particulars. Nonetheless, this alleged tip somehow works its way into
18 the reasonable suspicion analysis, or is otherwise considered by a reviewing court when
19 determining the merits of a defendant's motion.

20 In this case, despite Officer Kirchner's claim that the police were looking for a person
21 who was allegedly out to "kill a victim of a prior shooting,"⁴ the police never asked Mr. Lintz
22 once during his lengthy interrogation about any prior shooting, his relationship to anyone who
23 might have been the supposed target, nor do they once mention that they were on alert to find
24 someone who might be out to kill someone else. Moreover, if one takes the declaration of
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26 ⁴ One presumes the "victim of a prior shooting" was not already deceased; otherwise, the police presumptively would have been searching Colma and not Hunter's Point.

1 Officer Kirchner at face value, every black man in a car in the Bayview/Hunters Point area would
 2 have been a potential suspect.

3 The defendant realizes that the reason why the police were on patrol is irrelevant, and that
 4 the Government does not use Officer Kirchner's statement to justify the seizure of Mr. Lintz.
 5 Nonetheless, should any further mention be made of this "tip," the defendant will demand
 6 complete discovery relating to it – that is, any recordings and or notes made of this alleged
 7 anonymous tip, and specifically the person or entity to whom this tip was made, the time and date
 8 of the tip, and any information relating to the source of the tip.

9 **ARGUMENT**

10 **I. The Seizure of Mr. Lintz and the Search of His Person Was Illegal**

11 There appears to be no dispute that Mr. Lintz was detained by police after he had exited
 12 the Jeep at issue, and was approximately 20 feet from the car when he was ordered back into the
 13 vehicle.⁵ The question is whether the act of ordering him back into the car without any cause was
 14 proper.

15 As a starting point, this Court is probably aware from reading the Ninth Circuit's decision
 16 in *United States v. Williams*, 419 F.3d 1029 (9th Cir. 2005), that there is a very real split among
 17 courts as to whether police may order a individual who has exited a car after a police stop to
 18 return to the car. Several federal circuit courts have held, as did the *Williams* court, that under
 19 the logic of the Supreme Court's decision in *Maryland v. Wilson*, 519 U.S. 408 (1997), police
 20 may order a person leaving a vehicle stopped by police to either stay in the car or return to it in
 21 order to insure officer safety. *See Williams*, 419 F.3d at 1034; *Rogala v. District of Columbia*,
 22 161 F.3d 44 (D.C. Cir. 1998); *United States v. Moorefield*, 111 F.3d 10 (3d Cir. 1997). In
 23 contrast, a number of state courts have held that police may not order a passenger to return to a
 24 car after a police stop unless there is independent cause for the detention. *See People v. Dixon*,
 25

26 ⁵ The defendant accepts the assertion of Officer Kirchner that Mr. Lintz was in fact 20
 feet away from the car when he was ordered back.

1 21 P.3d 440 (Colo. Ct. App. 2000); *Dennis v. State*, 345 Md. 649 (1997); *Wilson v. State*, 734
 2 So.2d 1107 (Fla. Ct. App. 1999); *Walls v. State*, 714 N.E.2d 1266 (Ind. Ct. App. 1999).

3 Hopefully, the Supreme Court will someday resolve the split between the various courts
 4 in this country about whether police may detain a passenger leaving a vehicle after a valid police
 5 stop. Until it does, Mr. Lintz appreciates the fact that in this Circuit, they may do so.

6 That fact does not resolve this case, however, because this case presents issues not
 7 addressed by *Williams*. The *Williams* case involved a situation where the police undisputedly
 8 conducted a valid vehicle stop, and only after the vehicle was validly stopped did the passenger
 9 get out of the car. *Williams*, 419 F.3d at 1031. The passenger was “immediately ordered” to get
 10 back into the car, a fact which was crucial to the *Williams* court’s decision to uphold the police
 11 action. As the Ninth Circuit reasoned,

12 When *Williams* attempted to exit the vehicle, *the automobile had already been lawfully*
 13 *stopped with him inside*. The officer’s order to get back into the automobile merely
 14 maintained the status quo by returning the passenger to his original position as an
 15 occupant inside the car. . . . At most, such an order to re-enter a car that the passenger
 16 voluntarily entered, *and just exited*, cannot be characterized by [sic] anything but a “mere
 17 inconvenience. . .”.

18 *Williams*, 419 F.3d 1033 (emphasis added).

19 The issue not decided in *Williams* is whether police may order a person back into a car
 20 which was stopped by the driver for reasons *unrelated to police commands*, and where the
 21 passenger is out of the car and some distance away when s/he receives the police order to return
 22 to the car. In other words, may the police pull up behind a stopped car, claim that they *could*
 23 have stopped the car for some vehicle violation, and then detain anyone who was a passenger in
 24 the car regardless how far away that passenger was from the vehicle?

25 Mr. Lintz contends that the answer to this question is no, and that to rule otherwise would
 26 be an improper extension of *Maryland v. Wilson*. As noted above, many courts have refused to
 27 extend *Wilson* to any situation where a passenger happens to be in a car which is stopped for a
 28 traffic violation and wants to get out; but those courts which have extended *Wilson* to those

1 individuals who try to get out of a car talk about preserving the status quo in order to ensure
 2 officer safety.⁶ But how far does the issue of officer safety extend? Suppose, for example, a
 3 police officer comes upon a group of individuals standing together on the street, and one of the
 4 individuals does something which gives the officer a founded suspicion to pat search him. Does
 5 this mean that everyone standing in the group can be detained as well because one of them might
 6 walk away and later shoot the officer in the back? The answer is clearly no; the Supreme Court
 7 has held that when a person is approached on the street, “[t]hat person need not answer any
 8 question put to him; indeed, he may decline to listen to the questions at all *and may go on his*
 9 *way. . . .* He may not be detained even momentarily without reasonable, objective grounds for
 10 doing so; and his refusal to listen or answer does not, without more, furnish those grounds.”
 11 *Florida v. Royer*, 460 U.S. 491, 498 (1983)(emphasis added). *See also Sibron v. New York*, 392
 12 U.S. 40 (1968)(individual in group may not be searched absent founded suspicion that the
 13 individual was armed); *Ybarra v. Illinois*, 444 U.S. 85, 90-94 (1979)(police enter bar to search
 14 for drugs; police cannot search everyone in bar without individualized founded suspicion). And
 15 to extend this issue further, suppose there was this same group of individuals, and one of them
 16 walked away before the police arrived; would the police have the right to detain that individual
 17 on the grounds of officer safety as he walked down the street merely because he was formerly
 18 associated with someone who the police determined to subject to a pat search? Again, the
 19 answer is clearly no in light of the above authority. *See also United States v. Causey*, 818 F.2d
 20 354, 360 (5th Cir. 1987)(court equates right to be free from warrantless searches with the “right
 21 to walk away from interrogating officers.”). Yet that is what the Government is arguing here;
 22 simply because Mr. Lintz had been in a car which could have been (but apparently was not)

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 24 ⁶ The logic of these cases remains unclear to Mr. Lintz, insofar as *Wilson* discussed the
 25 increased accessibility of guns to people in a car – “[o]utside of the car, the passengers will be
 26 denied access to any possible weapon that might be concealed in the interior of the passenger
 compartment.” *Wilson*, 519 U.S. at 414. If a person wants to get out of a car and run away, it
 seems fairly clear that such a individual would pose a lesser, and not greater, threat to officer
 safety.

1 ticketed for a minor vehicle violation, he was subject to being detained even though he left the
2 vehicle and was some 20 feet away when the police pulled up behind the car. To stop a
3 passenger in such a situation is not preserving the status quo, *i.e.*, the police are not keeping
4 everyone in a car in the same position they were in when the police stopped the car; rather, they
5 are detaining a person who has decided to go about his business and putting him into a position
6 different than the one which existed when the police pulled up behind the vehicle. Indeed, one
7 can envision taking the Government's argument to its fullest extension; suppose the police see a
8 car make an illegal u-turn into a driveway from blocks away, and see a passenger get out of the
9 car and walk into a house. Under the Government's reading of *Williams*, the police can pull up
10 behind the car, even if it is minutes later (or even more) and go into the house to order the
11 passenger to get back into the car because at the time the police concluded that the vehicle was
12 subject to citation, the person was a passenger in the car.

13 Respecting the reasoning of *Wilson*, and with the understanding that this Court must
14 follow *Williams*, Mr. Lintz suggests that this Court rule that *Williams* applies only when police
15 make a valid traffic stop and a passenger *who is in the vehicle at the time of the stop* attempts to
16 get out of the car. Those were the facts of *Williams*, and any further extension of *Williams* would
17 be unwarranted and unfortunate as a matter of constitutional law. Where, on the other hand, a
18 car stops and a passenger gets out to go about his or her business, police may not subsequently
19 detain that individual and order him or her to return to the car merely because at some time prior
20 he was a passenger in the car. This application of *Williams* avoids the nightmare of having courts
21 determine the validity of a detention based upon the proximity of a former passenger to a car
22 stopped for a traffic violation.

23 In this case, Mr. Lintz accepts Officer Kirchner's statement that he was some 20 feet
24 away from the car when the police ordered him to return to the car. There is no way he could
25 have gone 20 feet if, as is suggested in the Government's papers, he was in the car when the
26 police pulled up. This is especially true if one accepts Officer Kirchner's declaration that he

1 (Officer Kirchner) was already out of the police car and behind the Jeep when Mr. Lintz started
2 to get out, and that Mr. Lintz immediately complied with Officer Kirchner's command to halt
3 and get back into the car.

4 Mr. Lintz believes that his motion should be granted on the basis of what has been
5 submitted to this Court. If this Court cannot grant his motion on the papers before it, he asks for
6 an evidentiary hearing so that he can cross examine the officers and show exactly what happened
7 in this case so that the Court can adequately rule on the merits of this motion.

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9 Dated: August 8, 2008

10 Respectfully submitted,

11 BARRY J. PORTMAN
12 Federal Public Defender

13 /s/

14 GEOFFREY A. HANSEN
15 Chief Assistant Federal Public Defender

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Attachment A

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6 Counsel for Defendant LINTZ
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9
10 IN THE UNITED STATES DISTRICT COURT
11
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 v.

16 JAMES LINTZ,

17 Defendant.

18) No. CR 08-0298-SI

19)
20) **DECLARATION OF**
21) **ROBERT ULTAN IN SUPPORT OF**
22) **DEFENDANT'S REPLY**

23 I, Robert Ultan, declare and state:

24 1. Since 1992, I have been employed as an investigator for the Federal Public Defender's
25 Office in San Francisco, California.

26 2. As part of my job, I regularly contact the California Department of Motor Vehicles
("DMV") and get information about and the records of individuals involved in the cases I am
assigned to work on.

3. Among the categories of records maintained by DMV is a history of the citations for
California Vehicle Code violations issued to a particular driver.

4. On August 5, 2008, I contacted DMV via phone and got information about the driver
records of Charles Earl Toney (DOB: 10-26-85; CDL: D2236640.)

1 5. The representative of DMV told me that there are no citations on the driver record of
2 Charles Earl Toney.

3 I declare under penalty of perjury that the foregoing is true and correct to the best of my
4 knowledge and belief.

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6 Executed this 8th day of August, 2008, at San Francisco, California.

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9 ROBERT ULTAN
10 Federal Public Defender Investigator

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